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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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MAR 15 2007

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 05 264 50562

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides software development services. It seeks to employ the beneficiary permanently in the United States as a computer software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the petitioner has not overcome the basis of denial.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 23, 2001. The proffered wage as stated on the Form ETA 750 is $66,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1990, a gross annual income of $444,351, no net income and six employees. In support of the petition, the petitioner submitted the first page of its 2003 and 2004 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 26, 2005, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports,

federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its IRS Form 1120 U.S. Corporation Income Tax Returns for the years 2001 through 2004.

The tax returns reflect the following information for the following years:

	2001	2002	2003	2004
* Net income	$9,337	$168	$233	($270)
*† Compensation of Officers	$0	$0	$0	$0
* Salaries and Wages	$0	$0	$0	$0
** Cost of Labor	$2,093,450	$868,453	$655,346	$393,589
‡ Current Assets	$30,787	$4,936	$5,323	$24,513
‡ Current Liabilities	$25,009	($55)	$0	$19,188
Net current assets	$5,778	$4,991	$5,323	$5,325

* From Page 1 of the IRS Form 1120
† From Schedule E
** From Schedule A
‡ From Schedule L

Significantly, the Schedules E of the tax returns reflect that the sole officer does not own any interest in the corporation. Rather, attached statements reveal that the petitioner is 100 percent owned by Indigo Holdings, LLC.

In addition, the petitioner submitted copies of the first page of the IRS Form 1040 U.S. Individual Income Tax Returns for 2001 through 2004 filed by the petitioner's sole officer. These returns, filed jointly with the officer's wife, provide the following information:

	2001	2002	2003	2004
Wages, Salaries, Tips, etc. (Line 7)	$90,684	$91,439	$73,605	$62,276
Rental Real Estate, Royalties, Partnerships, S Corporations, Trusts, etc. (Line 17)	$418,350	$39,698	$109,689	$162,486

The petitioner, however, did not submit Forms W-2 issued to the sole officer or Schedules E, which would list the source of the income listed on Line 17. The petitioner also submitted its 2005 quarterly wage and withholding reports for New York, California, North Carolina and New Jersey. The North Carolina reports reflect wages of $9,600, $11,200 and $9,600 paid to the petitioner's officer during the first three quarters of 2005, for a total of $30,400. The petitioner did not submit

the fourth quarter report. These wages are not consistent with the full $62,276 listed as wages on the officer's IRS Form 1040, suggesting Line 7 includes wages from other sources.

The petitioner also submitted an unaudited profit and loss statement for January through October 2005 and 2005 bank statements for the petitioner.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on November 17, 2005, denied the petition.

On appeal, counsel asserts that a "sister" corporation actually signs the consulting contracts, which it subcontracts to the petitioner, which employs the workers. Counsel further asserts that the same shareholder owns both corporations, which both distribute all profits to the shareholder. Counsel explains that expenses are paid at the end of the year, concluding that cash balances in November are more reliable. In addition, counsel asserts that the beneficiary's ability to generate income should have been considered. The petitioner submits the tax returns of the petitioner's "sister" subchapter S corporation, Apollo Group Consulting, Inc.; a letter from the sole officer affirming the petitioner's ability to pay the proffered wage; an opinion from a certified public accountant affirming the petitioner's ability to pay the proffered wage; payroll reports for March 26, 2001 and bank statements. The Schedules K-1 for the purported "sister" corporation reveal that the petitioner's sole officer owns 100 percent of Apollo Group Consulting, Inc. As stated above, however, Indigo Holdings, LLC owns 100 percent of the petitioner. Thus, there is no documented common ownership between the two companies.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary any wages in 2001 through 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied

on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 through 2004. During those years, the petitioner shows a net income and net current assets well below the $66,000 proffered wage. The petitioner, therefore, has not demonstrated the ability to pay the proffered wage out of its own net income or net current assets.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L considered above in determining the petitioner's net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Moreover, counsel's assertion that the November balances are more reliable that the corporation's year-end cash is not persuasive. Any liabilities satisfied in December would remain outstanding in November. As stated above, any consideration of assets such as cash without consideration of the company's liabilities does not provide an accurate picture of the company's finances. That is why CIS considers cash only in the context of *net* current assets.

Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that CIS should consider the beneficiary's ability to generate income for the petitioner. The Administrative Appeals Office is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of the decision in *Masonry Master, Inc.*, 875 F.2d at 898, mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, while it appears that the petitioner intends to subcontract the beneficiary to its clients, no detail or documentation has been provided to explain how the beneficiary's employment as a computer software engineer will sufficiently increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel's reliance on the assets of the petitioner's "sister" corporation and the distributions to the petitioner's sole officer is not persuasive. A corporation is a separate and distinct legal entity from its owners, stockholders and sister corporations. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

The record does not satisfactorily establish the relationship between the petitioner and Apollo Group Consulting. The petitioner did not submit a binding agreement whereby Apollo Consulting, Inc. has agreed to cover the petitioner's payroll. More significantly, as discussed above, the companies do not share common ownership as alleged by counsel. The tax returns do not demonstrate that Apollo Group Consulting, Inc. operates as a type of pass-through corporation for the petitioner. For example, in 2001, Apollo Group Consulting, Inc. shows gross receipts of only $574,307 and costs of labor of only $157,051. Yet, the petitioner shows gross income of $2,723,481 and costs of labor of $2,093,450. Moreover, while one subcontracting agreement mentions both the petitioner and Apollo Group Consulting, most contracts are between the petitioner and its clients alone. Significantly, the Form 1099 from a client is issued to the petitioner, indicating it receives its own revenues directly, not through Apollo Group Consulting. Thus, Apollo Group Consulting does not appear to be collecting revenues for the petitioner and distributing the amount of the petitioner's employment costs to the petitioner as implied by counsel.

As is now clear from the Schedules K-1 for Apollo Group Consulting, Inc., the majority of the distributions to the petitioner's officer do not derive from the petitioner but from Apollo Group Consulting, Inc. Thus, this is not a case where the petitioner was generating large profits and

distributing them to its sole shareholder. In fact, as discussed above, the officer has no ownership interest in the petitioner. As such, we will not consider the officer's wages and distributions from Apollo Group Consulting, Inc. towards the petitioner's ability to pay the proffered wage.

Further, the petitioner may not rely on its payroll as those amounts represent wages already paid to other employees. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Finally, the assurances from the petitioner's sole officer and a certified public accountant are insufficient. As the petitioner does not employ 100 workers, it cannot rely on such a statement. 8 C.F.R. § 204.5(g)(2). Moreover, the statement from the accountant relies on the net income of Apollo Group Consulting, Inc. As discussed above, we decline to consider the net income of that company.

In light of the above, the petitioner has not demonstrated that any other funds were available to pay the proffered wage beyond those reflected on the petitioner's tax returns. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and thereafter. Thus, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.